Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978
No. 78-266

SYUFY ENTERPRISES, a partnership, successor in interest to original plaintiffs, LAS VEGAS DRIVE-IN THEATRE, INC., SMOKE RANCH DRIVE-IN THEATRE, INC., LAS VEGAS THEATRE CORPORATION, and CONFECTION CORPORATION OF LAS VEGAS, INC.,

Petitioner,

vs.

NATIONAL GENERAL THEATRES, INC., ABC INTERMOUNTAIN THEATRE CO., NEVADA THEATRE CORPORATION, SOUTHWEST AMUSEMENT CORPORATION, LUCILLE MARLEAU CRAGIN, dba EL PORTAL THEATRE, and LAS VEGAS CINERAMA THEATRE CO.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

This brief is submitted by respondents National General Theatres, Inc. ("National General"), ABC Intermountain Theatre Company ("ABC") and Las Vegas Cinerama Theatre Company ("Las Vegas Cinerama") in opposition to the Petition for a Writ of Certiorari filed by petitioner Syufy Enterprises, a partnership, et al. ("Syufy").

Questions Presented.

Petitioner's statement of Questions Presented for Review as well as its Statement of the Case fail to present the issues raised and considered by the District Court or by the Court of Appeals and fail to accurately present the facts disclosed by the evidence upon which the District Court's decision was based and affirmed by the Court of Appeals. Respondents, therefore, are required to present a Counter Statement of Issues Presented for Review and Statement of the Case.

Within the context of such issues and facts this Court will conclude, as did the District Court and Court of Appeals, that there was insufficient evidence to present any issue of material fact to the jury.

Counter Statement of Issues Presented for Review.[1]

1. Is there sufficient evidence in the record from which a reasonable jury could conclude respondent exhibitors entered into an agreement not to license and exhibit first-run motion pictures day and date with petitioner's drive-in theatres in Las Vegas, Nevada?

2. Assuming *arguendo* any such agreement, was there sufficient evidence from which a reasonable jury could conclude that such agreement had any adverse effect on petitioner?[2]

[1]The abbreviations "Cl. R.," "Tr.," "Ex." and "PB" refer respectively to "Reporter's Transcript," "Transcript," "Exhibit" and "Petitioner's Brief."

[2]The Court of Appeals, holding that there was insufficient evidence as to liability, including the fact of damage, did not discuss the damage (amount) issue as to which the District Court had found adversely to petitioner. (Cl. R. 221, 222, paras. 29, 34.)

3. Did the Court of Appeals below properly affirm the directed verdict entered by the District Court?

Counter Statement of Facts Relevant to Issues Presented for Review.

1. Nature of the Case.

The original complaint (filed November 1971) against respondents, under Section 4 of the Clayton Act (15 U.S.C. §15), sought damages for violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2).[3] A counterclaim on behalf of all respondent-defendants other than Nevada Theatre Corporation ("NTC") charged that petitioner, together with others, was engaged in a conspiracy using litigation, threats of litigation, coercion of motion picture distributors and fabrication of evidence, to eliminate and prevent competition between petitioner's theatres and those owned and operated by respondents and others in Las Vegas, Nevada and in various other areas in the Western United States. The counterclaim was tried before the same jury approximately 12 months after the motion for directed verdict was granted. A mistrial as to the counterclaim was declared because of possible jury contamination brought to the attention of the District Court by respondents' counsel, although the court be-

[3]Petitioner's complaint and the Pretrial Statement alleged an unlawful monopolization of the exhibition of first-run motion pictures in Las Vegas, Nevada pursuant to Section 2 of the Sherman Act. The District Court's finding that there was no evidence of any violation of Section 2 of the Sherman Act, Cl. R. 222, was not contested by petitioner in its appeal to the Ninth Circuit Court of Appeals and is not raised by petitioner in its petition to this Court.

lieved the counterclaim should go to the jury on the facts as presented. (Tr. April 8, 1976, 22-25.)[4]

NTC was dismissed prior to trial as a result of a "settlement" agreement with petitioner, which agreement precluded NTC from competing for licenses of first-run motion pictures in Las Vegas, Nevada except as determined by petitioner.[5] (Tr. 319-320, 325-326, Ex. 1.)

After the presentation of petitioner's case, respondents moved for a directed verdict on the following grounds: (1) there was neither evidence of the violations of law alleged in the complaint and the pretrial order, nor of any impact or damages resulting from such alleged violations; (2) neither the complaint nor the pretrial order presented as an issue any claim

[4]The District Court commented during the argument on the Motion for Directed Verdict, although all evidence had not been presented on the counterclaim, that there was already sufficient evidence to go to the jury. (Tr. 3198.) As held in *Beacon Theatres, Inc. v. Westover*, 252 F.2d 864 (9th Cir. 1958), rev'd on other grounds, 359 U.S. 500, 79 S.Ct. 948, the right ". . . to negotiate for contracts [for exclusive licenses] as part of its normal method of doing business is as much entitled to protection as any property or contract right in the more traditional sense." (252 F.2d at 872.)

[5]Mr. Katz, chief executive officer of NTC, testified the agreement was entered into *not* because he believed it to be in the best interest of his company, but because of the substantial legal expenses being incurred in this action, as well as the severe competition in the marketplace. (Tr. 639-641.) The District Court had serious reservations as to the propriety of the agreement (Tr. 3209, 3211), which precluded NTC from bidding exclusively in Las Vegas on any motion pictures which had been licensed for exhibition day and date in Orange County, California, an area Mr. Katz stated had nothing to do with Las Vegas. (Tr. 1908.) The agreement did not preclude plaintiff from bidding and playing exclusively in Las Vegas. (Tr. 1884-85.) NTC, in spite of this agreement, still attempts to play motion pictures exclusively and offers the distributor higher rental terms for exclusive first-run as opposed to day and date exhibition (Tr. 316-319), over petitioner's objection. (Tr. 320.)

of agreement among defendants to prevent petitioner from playing first-run motion pictures on a day and date basis; (3) alternatively, in the event the District Court considered this as an issue before it, there was insufficient evidence of any such agreement, and such agreement could not result reasonably in any impact on petitioner; and (4) there was insufficient evidence of any damage suffered by petitioner by reason thereof. (Tr. 2969, *et seq.*)

On June 27, 1975, respondents' motion for directed verdict was "granted upon all the grounds argued to this court . . ." and "defendants' counsel [were] directed to prepare and submit . . . proposed findings of fact and conclusions of law . . . in accordance with Local Rule 19 of this Court." (Cl. R. 279, entry 6/27/75.) The findings of fact and conclusions of law were requested by the District Court in lieu of an opinion. (Tr. April 8, 1976, p. 17.) No objections were filed by petitioner to the findings of fact or conclusions of law.

2. The Parties and Las Vegas Theatre History.

The original plaintiffs were four corporations named in the caption of the complaint. (Cl. R. 1.) Prior to trial, these corporations were merged into a limited partnership, known as Syufy Enterprises. Just prior to opening the Las Vegas Drive-In No. 1 (January 1966) petitioner owned and operated nineteen theatres in California and Utah; fifteen drive-ins and four walk-ins. (Tr. 1393-1399.) As of the date of trial (April 1975), petitioner owned and operated more than one hundred theatre screens, including thirty-eight walk-in screens, but no walk-in screens in Las Vegas, Nevada.

The Fox Las Vegas Theatre and Boulevard Theatre (walk-in theatres) owned and operated by National General, opened in March 1966 and April 1968 respectively. (Cl. R. 61, 65.) During the relevant period (the opening of petitioner's drive-in, 1966, to the filing of the complaint), National General also owned and operated the Nevada Drive-in Theatre, Las Vegas. (Cl. R. 215, para. 10, Tr. 120.) The Las Vegas Cinerama Theatre (walk-in), owned and operated by Las Vegas Cinerama, opened in January 1965; the Parkway Theatre (walk-in), owned and operated by ABC, opened in February 1970. (Cl. R. 61, 65.) The Guild, Fremont and Huntridge Theatres (walk-ins), owned and operated by former defendant NTC were in existence as of January 1966, when petitioner's first drive-in opened (Tr. 61, 65), as was the El Portal (walk-in), owned and operated by Cragin. The Red Rock Theatres, now consisting of an eleven screen walk-in complex, commenced operations in 1966 with the opening of the Red Rock No. 1 (Tr. 107) followed by the opening of ten additional screens in 1972-1973. (Tr. 819-821, Cl. R. 219, para. 21.) These theatres are owned and operated by Cragin Industries, a non-party. (Tr. 802-803.) No claim was made in the complaint, pretrial order or at trial that the Red Rock Theatres were part of any unlawful conduct or plan.

The named non-party co-conspirators were and are the eleven major distributors of motion pictures, suppliers of motion pictures to all Las Vegas theatres. None were called to testify as witnesses or by deposition. (Cl. R. 62-63.)

Additional theatres operated in the Las Vegas market during the relevant period and continue to operate

today. There were and still are other drive-in theatres operated by non-parties. (Tr. 263.) A walk-in theatre, the Bonanza, was owned and operated by a non-party from August 1967 through November 1970. (Tr. 309, 643.) This theatre closed when the premises it occupied were no longer available. (Tr. 643.) The Four Star Theatre (walk-in) was owned and operated by a non-party from 1966 to 1971. The Bonanza and Four Star Theatres competed for the same motion pictures exhibited by respondents and petitioner. (Tr. 232, 284-285, 498.)

There has been no restriction in the growth of theatres in Las Vegas, Nevada. At the present time there are more than 27 walk-in screens and 12 drive-in screens. (Tr. 400-402, 641.) Subsequent to the filing of the complaint, the theatres previously owned and operated by National General (Fox Las Vegas, Fox Boulevard and Nevada Drive-In) were acquired by an exhibitor known as Mann Theatres, and the ABC Parkway Theatre by an exhibitor known as Plitt Theatres. Neither Mann nor Plitt are parties to this action, nor are any claims made as to them although they too exhibited pictures in Las Vegas on a first-run exclusive basis only. (Tr. 402-403, 724-726.) The Parkway and Charleston Theatres have been expanded into multi-screen walk-in theatres. (Tr. 725.) Former defendant NTC opened three additional walk-in screens known as the Cinema 1, 2 and 3. (Tr. 717.)

From its opening in 1965, the Las Vegas Cinerama Theatre exhibited road show pictures.[6] It therefore did not compete for first-run motion pictures against

[6]A road show picture, sometimes referred to as a hard ticket picture, is a motion picture exhibited on a reserved seat basis at a walk-in theatre for designated performances at premium prices. (Cl. R. 216.)

petitioner's drive-in or any walk-in theatres in Las Vegas until the end of 1969, when road show pictures became scarce. (Tr. 131, 136-137.)

3. Competition Among Theatres in the Las Vegas Market.

Petitioner's witnesses testified that theatres in the Las Vegas market were extremely competitive to each other. It was admitted that if a drive-in theatre played the same motion picture at the same time as a walk-in theatre (a day and date run), patronage at the walk-in theatre would be diluted anywhere from 25 to 35%. (Tr. 460, 1443-1445, 1456-1457.) Lloyd Katz, another exhibitor witness presented by petitioner, testified that a 10% drop in patronage at the NTC walk-in theatres would be substantial as it would have a substantial effect upon income. (Tr. 711.) Petitioner's counsel pointed out the Las Vegas theatre market is small, no more than five miles in radius (Tr. 494), with all theatres within short driving time and distance to each other. (Tr. 1794-1797, Ex. AR.) In response to the Court's questions, Raymond Syufy, petitioner's principal, admitted that 90% of a theatre's patronage came from within a five-mile radius. (Tr. 1297.)

Mr. Syufy further admitted that two separate geographical areas were necessary for a drive-in and a walk-in to successfully play a motion picture day and date (Tr. 1684-89), a conclusion similarly reached by Arnold Shartin, an executive and film buyer for petitioner during the relevant time period. (Tr. 1688, 1768-1775.) No evidence was offered or introduced to establish these two separate geographical areas in fact existed in the Las Vegas area.

Raymond Syufy admitted petitioner was not complaining about motion pictures exhibited exclusively

elsewhere as well as in Las Vegas, but only about those which played "day and date first-run" elsewhere but exclusively in Las Vegas. (Tr. 1284, 1418, 1436, 1866.) No evidence was offered or introduced as to which pictures played day and date first-run elsewhere but not in Las Vegas.

During the relevant period, respondents' individual policies were to operate their theatres on an exclusive first-run basis. (Tr. 262, 263, 287, 293, 885.) Similarly, during the same period the Bonanza Theatre, a non-party, had a policy of operating its theatre on an exclusive first-run basis. The Mann and Plitt entities (non-parties against whom no claim was made), which acquired the Las Vegas theatres operated respectively by defendants National General and ABC subsequent to the filing of the complaint, both had a policy of operating their theatres on an exclusive first-run basis. (Tr. 308, 309, 724-726, Cl. R. 219, para. 19.)

No evidence was offered or introduced as to how many pictures actually were played at any of respondents' theatres during the relevant period on an exclusive first-run basis. During this same period, however, petitioner's drive-in theatres exhibited motion pictures on a first-run exclusive basis at least 40% of the time. (Tr. 354-363, 367-375, 645-646, Cl. R. 221.) In fact, Lloyd Katz testified that NTC lost motion pictures to plaintiff on bids for first-run exclusive exhibition during this period. (Tr. 247.)

The evidence is undisputed that an exclusive first-run results in a higher box office gross (Tr. 287, 305, 669) for which theatre exhibitors, including petitioner, are willing to pay a high film rental. (Tr. 318, 642, 1431-1445, Exs. AB, AC.) In areas other

than Las Vegas, where petitioner operates walk-in and drive-in theatres, all petitioner's walk-in theatres generally played exclusive first-run although petitioner could have played its walk-ins day and date with its own and/or other drive-ins in these areas. (Tr. 1639-1660, 1663-1671, 1674, 1680-1682.) Petitioner claimed this was the result of some other conspiracy. (Tr. 1875-1879.) In Vallejo, California, for example, where petitioner owns all the drive-ins and walk-ins, petitioner exhibited pictures in its walk-ins on an exclusive first-run basis, allegedly over its own objection. (Tr. 2326-2327.)

The evidence is undisputed that the distributor must look at the entire market, all possible runs, to determine the maximum return it is able to realize, *i.e.*, distributing exclusive first-run followed by subruns compared with distributing day and date which practically eliminates subruns (Tr. 155-156, 519, 1474-1478); that if a distributor believed it could earn more distributing its motion pictures day and date as opposed to exclusively followed by subruns, it would offer its pictures day and date only. (Tr. 722.) Even petitioner's damage witness admitted he could not tell if a distributor would do better in the Las Vegas market licensing motion pictures exclusively followed by subruns or on a day and date basis. (Tr. 2641-2643.)

4. Split of Products History in Las Vegas, Nevada.

Petitioner, at the time of trial, admitted it was not claiming damage resulting from a split of product. (Tr. 1142.) Nevertheless, petitioner bases almost its entire argument on splits of product in Las Vegas in 1968 and 1971. Petitioner's failure to set forth the facts as to the limited split of product which existed (which

for one of the two periods, 1971, included petitioner) requires respondents to include this statement.

The definition of a split of product set forth in petitioner's brief (PB 6) is without reference to the record. As presented, the definition is inaccurate. It is correctly defined in the findings of fact (petitioner does not argue this finding of fact is in error) as follows:

> "A split of product (motion pictures) basically is an arrangement among participating exhibitors in a market area entered into with the knowledge and consent of distributors. The participants therein agree that a member thereof shall have the first right to negotiate with a licensing distributor. If such exhibitor is not able to agree upon terms with the distributor, then the other exhibitors in the split of product arrangement attempt to license that particular motion picture. A split of product can be by company or by picture. In a company split, the participating exhibitors agree that a member thereof shall have the right to negotiate for the pictures released by a given company prior to any other member's so doing. In a picture split, the participants agree that a member thereof shall have the right to negotiate for a particular picture prior to the other member's so doing." (Cl. R. 214-215, para. 7(f), Tr. 92-93.)

Splits of product existed in the Las Vegas market for *only* limited periods of time among *only certain exhibitors.* There was a split of product between the *only* two theatre exhibitors in Las Vegas during the period 1951 to 1965. (Tr. 100-113.) There was no split of product in 1966 or 1967. All then existing

theatres[7] were bidding. (Tr. 124-125, 138-142, 144-145, 200-201, 295, 306.)[8] In 1968, a split of product arrangement existed among *only* National General, Cragin (the El Portal Theatre only) and former defendant NTC. (Tr. 124-125, 138-142, 145.) Contrary to petitioner's citation to the record, there was no split in 1969 and no split meetings, as there was "all out bidding." (Tr. 141.)

In 1971, there was a split of product in which *petitioner,* NTC, National General, ABC, Las Vegas Cinerama and Cragin participated.[9] (Tr. 142, 1359-1377.) Petitioner withdrew from this split in September 1971 only after it "got what [it] wanted." (Tr. 1371-1374.) This litigation was commenced soon thereafter in November 1971.[10] The split from which petitioner withdrew in September 1971 terminated after several months, as admitted in petitioner's brief to the court below.[11] No evidence was offered or introduced regarding any distributor's disapproval or objection to the split of product arrangement, but it was undisputed that distributors were advised of the 1968 and 1971 split. (Tr. 150, 1376.)

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[7]ABC did not have a theatre in Las Vegas until February 1970, *supra,* p. 6.

[8]Except the Las Vegas Cinerama Theatre which was playing road show pictures and not competing for the same types of pictures as other theatres. (See pp. 7-8, *supra.*)

[9]The Red Rock Theatres were not part of this split arrangement. (Tr. 905-906.)

[10]Petitioner's counsel at one point in the proceedings stated he would accept Katz's testimony on the history of the split (Tr. 295), but then withdrew this offered stipulation. No evidence, however, contradicting this split history was introduced.

[11]Petitioner's opening brief to the Ninth Circuit Court of Appeals stated at page 9 that the 1971 split, which included petitioner, terminated several months after petitioner withdrew in September 1971.

A split of product is not an unusual arrangement. Petitioner has participated in such arrangements for many years with other exhibitors in other geographical areas as well as in Las Vegas. (Tr. 1048-1049, 1051, 1722, 1726, 1750, 1762-1763, 1764.) As Raymond Syufy testified, theatres work out a split in order to avoid "killing each other off." (Tr. 1284-1285.)[12]

5. The Distribution Method Demanded by Petitioner.

Petitioner admitted it wanted distributors to offer and license motion pictures in the Las Vegas market on a first-run day and date basis *only.* (Tr. 917, 948, 1390, 1990, 1997.) Lloyd Katz, petitioner's witness, admitted that petitioner advised him it did not want NTC to play any pictures other than day and date (Tr. 200, 319-328); so did witness Schmidt. (Tr. 868-872, 920.) It is undisputed this method of distribution and exhibition would insulate drive-ins from competing with walk-ins for licenses to exhibit first-run pictures, thereby resulting in less film rental to the distributors from the drive-ins. (Tr. 405.)

At the time of trial, there were seven drive-in screens in Las Vegas and twenty-five walk-ins. (Tr. 400-402, 641.) Las Vegas, being an extremely competitive theatre market required exhibitors to offer distributors substantial guarantees and advances of film rental as well as high terms to obtain licenses to exhibit first-run motion pictures. (Tr. 408-410, 641-643.) It is easier for new theatres, such as petitioner's drive-ins, to break into this competitive market through day and date exhibitions, since this eliminates competition with walk-ins. (Tr. 258.) Throughout the relevant period, petitioner's

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[12]The suicidal nature of bidding was recognized by the Court in *Brown v. Western Massachusetts Theatres, Inc.,* 288 F.2d 302, 305 (1st Cir. 1961).

drive-ins were bidding for exclusive first-runs (Tr. 2373, Exs. BD, BE), and in fact were bidding for exclusive second and third runs (Tr. 2356, Ex. BA), because of competition from others.[13] Petitioner preferred to play second run exclusive in a bidding situation rather than day and date with a walk-in without bidding (Tr. 2257-2258), entirely contrary to its temporary preference for first-run day and date rather than exclusive.

Outbid for pictures for exclusive first-run (Tr. 1037-1038, 1341-1346), petitioner desired a day and date policy for its drive-in screens temporarily to build its financial resources and then compete more vigorously for exclusive first-runs for its drive-in screens. (Tr. 681-682.) Petitioner presses this day and date policy temporarily on exclusive first-run for its drive-in screens with other exhibitors' walk-ins in Las Vegas at the same time as it is playing on an exclusive first-run policy in substantially all of its walk-in screens in other areas even with its own drive-in screens in those areas. (See pp. 9-10, *supra.*) At the same time petitioner insists on playing its drive-in screens in Las Vegas exclusively rather than day and date on second and third run Las Vegas.

6. Distributors Did Not Offer Motion Pictures in Las Vegas, Nevada on a Day and Date Basis During the Relevant Period.

Contrary to petitioner's unsupported assertion regarding the manner in which distributors offered motion pictures in Las Vegas (PB 6), no evidence was offered

[13]Bidding and playing first, second and third run exclusive in its drive-ins in Las Vegas is inconsistent with petitioner's expressed position that day and date first-run in Las Vegas is better for exhibitor *and* distributor.

or introduced as to which pictures or how many pictures during the relevant time period were offered first-run Las Vegas on an exclusive or "either/or basis" and no evidence was offered or introduced that any pictures were offered by any distributor on a day and date basis only. At most, the evidence may indicate that Paramount Pictures Corporation and one other unidentified distributor offered *some* pictures of an unspecified "class" on an "either/or" basis. (Tr. 260-262, 465-466, 1789, 1842, 2147-2149, 2226-2236.) No evidence was offered or introduced as to which pictures, when, or how many. No evidence was offered or introduced as to which theatres exhibited these pictures or that petitioner itself did not exhibit them first-run exclusive.

Petitioner did not call any film distributor representative as a witness and did not subpoena any documents from any film distributor. The only documents introduced into evidence as to how pictures were offered by distributors in Las Vegas during the relevant period indicate that all pictures, first and second run, were offered exclusive. (Exs. AG, AH, BB, BC, Tr. 1507, 1510, 2357, 2377.) It was undisputed that distributors interested in maximizing profit determine in their best interests how to offer motion pictures to exhibitors. (Tr. 255-256, 318, 722, 1874.)

As alleged in respondents' counterclaim, petitioner's claims against respondents were made to coerce non-party film distributors to license all motion pictures "day and date" in the Las Vegas market, by coercing defendant exhibitors to exhibit these motion pictures in the manner petitioner dictates as petitioner did with NTC through a purported "settlement" agreement. (P. 4, fn. 5, *supra.*)

THERE IS NO FACTUAL OR LEGAL BASIS FOR REVIEW BY THIS COURT.

Petitioner's basic argument to this Court is that all antitrust cases should be submitted to the jury and summary procedures avoided. This Court, however, has consistently held that, when used with care, summary procedures have a place in the antitrust field, as elsewhere. *White Motor Company v. United States,* 372 U.S. 253 (1963).

I

There Was Insufficient Evidence From Which Any Reasonable Jury Could Conclude Respondents Entered Into an Agreement Not to Play Day and Date With Petitioner's Drive-in Theatres in Las Vegas, Nevada, on First-Run Motion Pictures.

Neither the Court of Appeals nor the District Court ignored or misstated the evidence or improperly drew conclusions therefrom. Petitioner's entire argument is based on the premise that a jury should be permitted to draw unreasonable conclusions from uncontroverted evidence adverse to petitioner's claim. The Court below, quoting from its recent opinion in *Calnetics Corp. v. Volkswagen of America, Inc.,* 532 F.2d 674 (9th Cir. 1976), *cert. denied,* 429 U.S. 940, correctly applied a strict standard of review in sustaining the entry of the directed verdict. This was and is the same standard of review used in all other circuits and by this Court. *Sartor v. Arkansas National Gas Corporation,* 321 U.S. 620 (1944). A mere scintilla of evidence is not enough to avoid either a motion for summary judgment or a directed verdict; nor can a case be submitted to a jury when reasonable men cannot draw the inferences asserted by the party bearing the burden

of proof. *Dahl, Inc. v. Roy Cooper Co.,* 448 F.2d 17 (9th Cir. 1971); *Shumate & Co., Inc. v. National Ass'n of Sec. Dealers, Inc.,* 509 F.2d 147, 153 (5th Cir. 1975).

There have been numerous summary judgments and directed verdicts granted in favor of defendants in motion picture antitrust cases. Among these are *Dahl, Inc. v. Roy Cooper Co., supra; Brown v. Western Massachusetts Theatres, Inc.,* 288 F.2d 302 (1st Cir. 1961); *Viking Theatres Corp. v. Paramount Film Distributing Co.,* 320 F.2d 285 (3d Cir. 1963), aff'd *per curiam,* 378 U.S. 123; *Seago v. North Carolina Theatres, Inc.,* 42 F.R.D. 627 (E.D.N.C. 1967), aff'd 388 F.2d 987 (4th Cir. 1967), *cert. denied,* 390 U.S. 959 (1968).

Petitioner's entire claim that there was sufficient evidence to go to the jury on the issue of whether respondents entered into an agreement not to play day and date first-run with petitioner's drive-ins is based upon the alleged testimony of two witnesses. Petitioner cites partial and selectively distorted testimony of these two witnesses, Emmett Shane, an employee of petitioner (Tr. 761), whom petitioner identifies as an "independent witness" (PB 8) and Raymond Syufy, general partner of petitioner. The testimony of neither witness supports the conclusion stated on any reasonable basis.

The complete testimony of Shane shows nothing more than an independent decision by National General not to play day and date in Las Vegas, Nevada, consistent with its policy to maintain exclusivity in other areas involving all of its theatres. Shane's testimony, including the portion quoted by petitioner, was as follows:

"Q. After the distributor contacted you, whatever the distributor said to you, did you then have a conversation as a result of your conversation with Mr. Spencer, with Mr. Adams?

A. Yes, sir, I did.

Q. What did Mr. Adams say to you?

MR. ALBALA: Your Honor, I'd just like to know what period of time we're talking about?

THE COURT: He said '73.

THE WITNESS: October '72—October or Fall of '72."[14] (Tr. 775-776.)

"Q. What did Mr. Adams say to you?

A. I told Mr. Adams—

THE COURT: No. What did Mr. Adams tell you?

A. Mr. Adams told me not to worry about the three 20th Century Fox motion pictures, that Fox wanted to go day and date on them in Las Vegas—not to worry about it because no one was going to play day and date on these three pictures.

Q. Did you say anything in response to that to Mr. Adams?

A. I was concerned because this was a period in the split where we were experiencing some difficulty, and I was concerned that maybe there's always—maybe a split is going to blow up and someone would go day and date on one or two of three of these pictures. But he assured me

[14]Since the 1971 split ended several months after petitioner withdrew in September 1971, Shane must be referring to some other split arrangements as to which no evidence was introduced or just be mistaken in recollection. Shane was not with National General from August 1969 until approximately October 1972. (Tr. 782) (see p. 12, fn. 11, *supra.*)

that they had an agreement, an understanding, which was the substance of what he said, that no one would go day and date with the drive-in in Las Vegas.

Q. And what he indicated to you was that, just to clarify what he said, the agreement between himself and some of his competitor-exhibitors; is that correct?

MR. ALBALA: Your Honor, I object to the question, it's a leading question, the same question as before.

MR. SALOMON: All right.

Q. Would you expand on your answer? Who was the agreement with?

MR. ALBALA: Your Honor, I object to the procedure whereby he asks a leading question which he can't get in, and then asks the witness to mimic what he just tried to lead him on." (Tr. 779-781.)

* * *

"Q. Mr. Shane, what agreement did Mr. Adams refer to?

A. I don't know what agreement. All I can do is tell you what Mr. Adams said to me. I wasn't party to any agreement.

Q. He had an agreement with somebody?

A. Yes, sir." (Tr. 780-781.)

* * *

"Q. Did Mr. Adams ever say anything to you, the substance or effect of which was that an agreement existed between National General and other exhibitors in the Las Vegas area with respect to whether or not they would play day and date with anyone?

A. No, sir, I don't think he ever used the term, the words earlier to the situation that I have described, ever used the word 'agreement'. The inference was always there." (Tr. 783-784.)[15]

* * *

"Q. Mr. Shane, did anything happen that you observed that would indicate to you that in 1966 National General had an agreement with any of its competitors not to play day and date with anyone?

A. No sir.

Q. Did anything happen in the year 1967 which would indicate to you that National General had an agreement not to play day and date with anyone?

A. No, sir.

Q. How about 1968?

A. That is the time that I recollect we started to become a little more concerned about the advent of the drive-ins in Las Vegas. Prior to that time our concern was only to try to eliminate bidding and try to, per se, maintain an exclusive policy in Las Vegas. I don't think we ever recognized drive-ins as a competitor prior to 1968 or 1969.

Q. My question is, in 1968, did anything happen which indicated to you that an agreement

[15]As the District Court stated in response to respondents' objection, a witness is not permitted to draw an inference (Tr. 784), and such an inference cannot be evidence from which the trier of fact can then draw another inference.

existed not to play day and date with any drive-in?

A. No sir."[16] (Tr. 786-787.)

The substance of Shane's testimony is simply that, while he was with National General, it had a policy of exclusivity not only in Las Vegas, Nevada, but in all other areas where it owned and operated theatres; that Adams related to him a decision had been made *by* National General to maintain that exclusivity in Las Vegas; that Adams *never* said that there was an agreement with anyone not to play day and date (Tr. 784) and in fact nothing indicated to Shane that there was any such agreement. (Tr. 786-787.)

The only time Shane referred to any agreement is in regard to three 20th Century-Fox motion pictures in the fall of 1972. Petitioner did not offer any evidence or in any way seek to identify these pictures or to show petitioner sought to play these pictures; or that the pictures actually played in Las Vegas, Nevada, or that petitioner was damaged by not playing these unidentified pictures day and date. These unidentified pictures were released in late 1972 or 1973, *entirely outside of the damage period and long after the complaint in this action had been filed.*

When specifically asked by petitioner's counsel regarding this so-called "agreement", the witness stated

[16]If no facts existed during the relevant period from which one can infer an agreement, on what basis could Shane infer an agreement except by pure speculation and conjecture? See, *United Shoppers Exclusive v. Broadway-Hale Stores, Inc.*, 1966 CCH Trade Cases, ¶71,727 (N.D.Cal. 1965).

that he knew of no such agreement *or any facts supporting such an agreement* and was merely drawing what is a totally unsupported inference. (Tr. 784.)

The balance of the testimony cited by petitioner on this subject is by Syufy. Again, only a very selective *portion* of the testimony is set forth. (PB 16-17.) The significant portion of his testimony wherein he explains what he means is not cited. (Tr. 1306-1324.) Syufy admitted that when he used the word "agreement," he meant that Katz, Schmidt and Polier (an employee of National General) had *only* told him that there was a split of product among certain theatre exhibitors during a certain period of time and *he inferred* that by split they meant there was an agreement not to play day and date. (Tr. 1322, 1324.) It is undisputed that the only splits that existed during the relevant time period were a 1968 split among Cragin, NTC and National General, and a split in 1971 among petitioner, NTC, ABC, Las Vegas Cinerama and Cragin (*supra*, pp. 10-13), neither of which affected or could have affected petitioner. *Dahl, Inc. v. Roy Cooper, Inc., supra; Brown v. Western Massachusetts Theatres, Inc.*, 288 F.2d 302 (1st Cir. 1961); *Viking Theatre Corp. v. Paramount Film Distributing Corp.*, 320 F. 2d 285 (3d Cir. 1963) aff'd *per curiam* 378 U.S. 123; *United States v. Loew's Inc.*, 1962 CCH Trade Cases, ¶70,347 (S.D.N.Y. 1962). Petitioner specifically disclaimed any adverse effect on it by reason of any split. (Tr. 1142.)

Respondents submit this testimony (hearsay as to each other defendant and not admissible unless the conspiracy is proven by other credible evidence taken in its whole context) is insufficient evidence upon

which to submit to a jury the question of whether there was an agreement as claimed among all of the respondent theatre operators during the relevant period. The testimony is specifically that there were actually no statements made regarding any agreement. In addition, none of the testimony refers in any way to defendants Las Vegas Cinerama or ABC. ABC did not open a theatre and was not in the Las Vegas market until February 1970, and therefore could not have been a party to any alleged agreement since there was competitive bidding throughout 1970 and a split among all parties, including petitioner, in 1971. (See, pp. 10-13, *supra.*) The Las Vegas Cinerama Theatre was not a party to any split until 1971, which split then included petitioner. The Las Vegas Cinerama Theatre was not even competing for the same product as petitioner or other exhibitors until late 1969, and therefore could not have been a party to any such agreement. (See, p. 12, fn. 8, *supra.*)

Katz testified when asked regarding the existence of any such agreement, as opposed to a split, that there was none. (Tr. 293, 295, 675, 953.) The fact that day and date exhibition may have been discussed at split meetings in 1968 among Cragin, NTC and National General is immaterial.[17] It would be pointless for exhibitors to have a split arrangement in 1968 or 1971 to avoid cut throat competition[18] and simultaneously decide to play day and date and thereby dilute gross and profit. (Tr. 2162.)

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[17]Since the only split arrangement which did not include petitioner during the relevant period was in 1968, Katz' testimony can only relate to that year.

[18]As set forth in *Brown v. Western Massachusetts Theatres, Inc.*, p. 13, n. 12, *supra*, exhibitors are not obligated to engage in competitive bidding for motion pictures.

The Court of Appeals did not ignore the evidence. It specifically considered Shane's testimony, as well as that of Syufy. As this Court has held, mere parallel conduct in and of itself does not equate with proof of a conspiracy; the fact that the exhibitors did not play on a day and date basis (keeping in mind there was no evidence that motion pictures were generally available on this basis) does not equate with proof of a conspiracy. As this Court found in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 277 (1968), and as the Court of Appeals and District Court found below, in dealing with parallel conduct there may be various independent business reasons for respondents choosing to bid for films on an exclusive only first-run basis. In such a context, evidence of parallel action is insufficient to prove an agreement. This is a basic principle followed throughout the federal judiciary. *Brown v. Western Massachusetts Theatres, Inc., supra,* at p. 304; *Dahl, Inc. v. Roy Cooper Co., supra,* at p. 19; *Seago v. North Carolina Theatres, Inc., supra,* at p. 638.

In reaching its conclusion, the Court of Appeals also considered the fact that the Bonanza Theatre, not charged with being a member of the alleged conspiracy, also chose to exhibit motion pictures first-run exclusively rather than to play on a day and date basis, despite petitioner's request that it do so. Similarly, Mann Theatres and Plitt Theatres, also non-parties, both chose to exhibit pictures first-run exclusively rather than day and date in the very same theatres in which defendants National General and ABC respectively had exhibited motion pictures first-run exclusively. (Tr. 308, 309, 724-726, Cl. R. 219, para. 19.)

Petitioner's claim that evidence of an agreement can be inferred from the fact that no motion pictures played

first-run day and date in the Las Vegas market during the relevant period is totally without foundation. Petitioner's own walk-in theatres in areas outside of Las Vegas (Reno, San Francisco, San Jose, Oakland, etc.), including areas where it had both walk-in and drive-in theatres, played first-run exclusive, which was petitioner's policy, rather than first-run day and date. (Tr. 1639-1660, 1663-1671, 1674, 1680-1682.) Are we to infer that this was pursuant to some conspiratorial agreement between petitioner and others? Are we also to assume that the Bonanza Theatre, as well as Mann Theatres and Plitt Theatres played first-run exclusive pursuant to an agreement?

Katz' cited testimony that the participants in the 1968 split[19] were aware of Syufy's desire to play day and date and that the effectiveness of the split would continue if each of the participants continued with their independent historical policy to play exclusive means nothing more than that each member of the split knew it would have to bid against Syufy for pictures to play them first-run exclusively so as not to substantially dilute their grosses. As Katz testified, he preferred to play first-run exclusively; however, by reason of the cost of defending this litigation together with the competitiveness of the Las Vegas market and the guarantees and advances required in such bidding situation, he eventually agreed with petitioner to play day and date as part of a settlement agreement. (See n. 5, *supra.*) It is this competitive market which petitioner seeks to avoid.

Petitioner further argues that the parallel course of conduct of exclusivity was maintained by respondents against their economic interests because petitioner

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[19]Katz' testimony can only relate to that year, see p. 23, n. 17.

claims they could make more money on a day and date basis. In support of this conclusion, petitioner cites the testimony of Syufy and incorrectly cites testimony of Katz which is erroneously attributed to respondent Cragin. Katz simply testified that the losses experienced by him in the very competitive market declined when he no longer had to offer guarantees or pay high terms required for exclusive engagements. He did not testify that he was doing better playing day and date. (Tr. 302-303.) Syufy's cited testimony states no more than his drive-ins would have grossed more playing first-run all the time on a day and date basis, rather than only part of the time on an exclusive basis (Tr. 1301), and that two simultaneous runs of a motion picture gross more than one run, which latter statement is totally without significance. Syufy admitted that an exhibitor does not necessarily make more money by exhibiting day and date. (Tr. 2361-2363.)

From the distributor's business point of view, the total gross on first-run is not the end of the relevant analysis. What is important is the total revenue realized from a motion picture in an area. This is a function of box office gross from first-run and subsequent runs. Petitioner's own damage expert testified that to determine the best method of distribution it would be necessary to determine revenue from an exclusive run followed by subsequent runs (which was and is the pattern in Las Vegas) as compared to a day and date run, recognizing that the day and date run eliminates the subsequent run at a drive-in or walk-in if the drive-in plays it first-run exclusively. (Tr. 519, 1474, 1480.)

The inherent contradiction in petitioner's argument is demonstrated by analyzing the National General

theatre situation in Las Vegas. It is undisputed that, prior to petitioner entering the Las Vegas market, National General had both a drive-in and walk-in theatre. According to petitioner, National General would have made more money playing day and date between its own walk-in and drive-in than playing exclusive with a subsequent run in its own drive-in. The fact is National General did not do so before or after petitioner entered the market. Petitioner's argument in this factual context is totally unreasonable. It is unreasonable to suggest that a jury be permitted to draw inferences based on such a theory.

II

The Alleged Agreement Could Have No Impact on Petitioner as the Court of Appeals Properly Stated There Was No Evidence That Motion Pictures Were Available on a Day and Date Basis.

Petitioner claims that the Court of Appeals ignored evidence relating to the manner in which distributors offered motion pictures in Las Vegas during the relevant period. In support of this contention, petitioner cites the partial testimony of Katz. (PB 12.) In so doing, petitioner totally misreads what the Court of Appeals stated and what the evidence disclosed.

Petitioner fails to cite or in any way refer to the following statement by the Court of Appeals: ". . . On cross-examination appellant admitted that the large majority of films offered for bids during the 1967-1971 period were available on an exclusive basis only." Petitioner, in fact, does not take issue with this accurate statement of the evidence.

As set forth at pages 14-15, *supra*, petitioner offered no evidence as to what pictures or how many were

offered on an "either/or" basis or that petitioner did not play first-run exclusive any or all pictures so offered. Petitioner played exclusive first-run 40% of the time. (Cl. R. 221, para. 29.) No contention is made that any distributor offered any pictures day and date only.

Syufy admitted a distributor decides how it wants to offer a picture and that is the way the exhibitor makes its bid or offer. (Tr. 1874.) In fact, all witnesses so testified. (Tr. 255-256, 318, 722, 1874.)

When asked what motion pictures had been offered by distributors on an "either/or" basis, which petitioner apparently contends would have possibly permitted it to play on a day and date basis with a walk-in (assuming any walk-in desired to do so and assuming further the petitioner secured the picture in opposition to other drive-in theatres in the area), Syufy stated, "I would have to look at the records to answer that." (Tr. 1942, 1943.) At no time were any such records offered. Petitioner's statement that "in 1966, the distributors, prodded by Syufy's request, began to offer their films for exhibition in Las Vegas on an either/or basis . . ." (PB 6), is totally unsupported by the record. As Katz testified, "sometime prior to 1968" distributors "on occasion" offered a certain "class" of motion picture on an either/or basis. (Tr. 226-271, 465.) There was no evidence as to whether this practice on occasional pictures of a certain class continued beyond a period of time "prior to 1968." The only documentary evidence introduced regarding the manner in which pictures were offered by distributors (which documents were from petitioner's own files) showed that pictures were offered only on an exclusive basis during the relevant period. (See p. 15, *supra.*)

Furthermore, as the Court of Appeals pointed out, petitioner failed to call any distributors as witnesses (even by deposition testimony), and offered no evidence that distributors did not reach individual decisions as to the manner in which to offer motion pictures in the Las Vegas market.

Finally, although petitioner's entire claim is based on the concept that it was prevented from showing first-run motion pictures by the alleged agreement of respondents, the evidence showed that during the relevant period petitioner exhibited first-run motion pictures on a first-run exclusive basis more than 40% of the time. (Tr. 354-361, 366, 377, 644-648, Cl. R. 221, para. 29.) There was no evidence that any other exhibitor in Las Vegas, including any of the respondents, exhibited more first-run motion pictures than petitioner during the same period. (Cl. R. 221, para. 30.)[20]

III

The Court of Appeals Has Not Contravened This Court's Opinion in Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., or in Any Other Case.

Petitioner's citation of this Court's opinion in *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954), in support of its petition, is totally inappropriate.

In *Theatre Enterprises,* this Court affirmed a judgment for defendants entered on a jury verdict. The petitioner in that case urged that a directed verdict

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[20]In fact, there was no evidence offered or introduced as to how many weeks of exclusive first-run was played by any of respondents' theatres in Las Vegas. (Cl. R. 221, para. 30.)

should have been entered in its favor as to the issue of liability, arguing that parallel business behavior conclusively established agreement. This Court disagreed. In affirming the Fourth Circuit Court of Appeals, this Court held that sufficient other competent evidence must be presented before an "agreement" can be concluded. This Court did not hold, as asserted by petitioner, that the mere existence of parallel business behavior dictated the submission of the question of "agreement" to a jury, but rather held exactly the opposite.

The principle that a conspiracy or "agreement" cannot be inferred where there are other factors which are at least equal or more probable to show that the course of conduct engaged in was the result of business judgment is not unique to theatre cases. In *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 279, 280 (1968), 88 S.Ct. 1575, 1588, a summary judgment in favor of defendant was sustained even though there was circumstantial evidence from which one could arguably draw inferences of a conspiracy. The Supreme Court rejected petitioner's argument to the contrary as follows:

> "Obviously it would not have been evidence of conspiracy if Cities refused to deal with Waldron because the price at which he proposed to sell oil was in excess of that at which oil could be obtained from others. Therefore, it is only the attractiveness of petitioner's offer that makes failure to take it up suggestive of improper motives. However, it has been demonstrated above that for Cities to enter into any deal with Waldron for Iranian oil would have involved it in a variety of unpleasant consequences sufficient to deter it from making any such deal. Therefore, not only is the inference that Cities' failure to deal with the product of factors other than conspiracy *at least equal* to the inference that it was due to conspiracy, thus negating the probative force of the evidence showing such a failure, but the former inference is more probable." (Emphasis added.)

Conclusion.

At most, petitioner attempts to present to this Court a disagreement based on its unsupported interpretation of the evidence. It has presented nothing which "is of importance to the public" or where there is any "conflict of opinion and authority" between Circuit Courts of Appeals or between the courts below and this Court. For these reasons alone, as well as all the reasons set forth above, respondents respectfully submit that the Petition should be denied. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75 (1955); *Layne and Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1922).

Dated: October 13, 1978.

Respectfully submitted,

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Attorneys for Respondents.

Of Counsel:
ALLAN ALBALA.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of October, A.D. 1978.

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